

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 60351-5-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
CARL VINCENT HILL,)	Unpublished Opinion
)	
Appellant.)	FILED: June 29, 2009
)	

Lau, J. — Carl Vincent Hill challenges his conviction for child molestation in the first degree, arguing for the first time on appeal that the prosecutor improperly and prejudicially commented on his right to remain silent. We hold that the State violated Hill's right to remain silent because it introduced evidence that he failed to keep appointments with a detective and then used that evidence to argue guilt. Because the error was not harmless, we reverse Hill's conviction and remand for a new trial.

FACTS

On June 20, 2005, the State charged Carl Vincent Hill with three counts of child

molestation in the first degree involving his stepdaughter L.O. and occurring between June 2003 and June 2005. The State subsequently amended the information to one count of child molestation in the first degree. The first trial ended in a mistrial. A second trial commenced in April 2007. At trial, witnesses testified to the following.

In May 2003, Mimi O.¹ and Hill began dating. At that time, Mimi's daughter L.O. was 9 years old. On their first date, Mimi told Hill she was recently divorced from L.O.'s father, and Hill told Mimi about his daughter Tress from a previous marriage. Later Mimi discovered he also had a newborn baby with Tress's mother and two more children from another previous marriage.

Mimi and Hill were engaged sometime in January 2004, and they married in May 2005. As the relationship progressed, L.O. and Mimi would sometimes stay at Hill's house, and Hill would sometimes stay at Mimi's house. Hill took care of L.O. during the summer of 2004 while Mimi was working. L.O. liked staying at Hill's house and playing with Tress. But after the engagement, Mimi noticed changes in L.O. Mimi testified that L.O. slept with the light on, experienced nightmares, wet the bed, and lost her "sparkle." Report of Proceedings (RP) (Apr. 9, 2007) at 616.

Mimi also said that L.O. seemed excited about the upcoming wedding. In contrast, L.O.'s teacher, Rocky Diaz, said that L.O. seemed sad. L.O. told Diaz that she was uncomfortable about the upcoming wedding and sad about her mother getting married. Diaz told her those feelings were not unusual. At the wedding, L.O. sang and talked about being excited to have Hill as her new dad. However, soon after the

¹ We avoid using Mimi O.'s full last name to protect L.O.'s identity.

wedding, L.O. told Mimi she did not want Hill to be her dad. And after an incident in which Hill got upset with Mimi, L.O. asked her mother, "Why did you marry this guy?" RP (Apr. 4, 2007) at 473.

Tayla Parrott, a student at L.O.'s elementary school, said that on Friday, June 3, 2005, L.O. disclosed that "her stepdad was touching her." RP (Apr. 3, 2007) at 264. L.O. asked Tayla not to tell anyone, but L.O. eventually agreed to talk to Kat Manley, a para-educator at the school. Manley said Tayla and L.O. contacted her and L.O. disclosed that her stepfather had been molesting her. Manley then informed John Cashmere, the elementary school counselor, about the disclosure. The following Monday, Cashmere talked with L.O. and then reported the allegation to Child Protective Services (CPS).

CPS social worker Michelle Scott and Ferndale Police Officer Melanie Campos interviewed L.O. on Monday, June 6. Scott said that at the beginning of the interview L.O. was talkative, open, and had many positive things to say about Hill. Later when describing the abuse, L.O. became very uncomfortable. L.O. told Scott that Hill had inappropriately touched her about 15 times. She described how he touched her and drew diagrams of the house showing where it happened.

On June 7, the sheriff's office and CPS informed Mimi about L.O.'s disclosure and asked her not to talk to Hill about it. That night, L.O. talked to Mimi for the first time about what happened. Mimi never talked to or heard from Hill again, other than a benign phone message that evening asking how she was doing.

Three days later, Mimi took L.O. for a medical exam performed by Margaret Jahn, a nurse who does child sexual

assault examinations for Whatcom County Child Advocacy Center. L.O. told Jahn that the first time it happened was the first night she spent the night at Hill's house. L.O. woke up and "felt something in my privates." RP (Apr. 3, 2007) at 228. She asked Hill to stop but he would not, so she got up and ran to her mother. L.O. said it happened about 15 times, all at Hill's house. And the final time was about two weeks before the wedding. She said he touched her under her clothes "with his finger and his hands where babies come out." RP (Apr. 3, 2007) at 229. Jahn concluded that her physical examination of L.O. was consistent with the sexual abuse she described. But she acknowledged it was a normal examination and did not rule the abuse in or out.

L.O. testified it happened the most when she was sitting on Hill's lap in front of the television when no one else was around. However, it also happened under the stairs. She said he touched her below the waist both over and under her clothes. Describing an incident under the stairs, she said he grabbed her by the hips and nuzzled her bottom with his nose, making a sniffing noise. She said these incidents made her feel uncomfortable, and when she asked him to stop, sometimes he would and sometimes he would not. She said she did not tell her mother because she was scared and knew her mother liked Hill.

Joan Gaasland-Smith, a sexual assault case specialist at the Whatcom County Prosecuting Attorney's Office, testified about the typical manner in which children disclose sexual abuse. She said L.O.'s behavior and reactions were, in her experience, within the norm for children who had been sexually abused. Finally, L.O.'s cousin Matthew also described his observations of L.O.'s behavior.

At trial, Hill admitted that L.O.

sometimes sat on his lap, but he denied touching her in the manner she had described. He said L.O. had behavior problems and often rebelled against discipline. Hill's ex-wife Brenda Rine-Smith, her current husband Bill Rine-Smith, Hill's mother, and Hill's co-worker Tyler Huartson also testified in support of Hill.

Throughout the trial, and without objection, the prosecutor described, argued, and elicited testimony about Hill's interactions with Detective Alan Smith of the Whatcom County Sheriff's Office. First, during his opening statement, the prosecutor said,

Detective Smith when he was contacted, called the defendant to get his side of the story. Not specifics, but they set an appointment up. The defendant when Detective Smith came in the next day had left a message on his phone cancelling that appointment, because he was too busy at work and wanted to reschedule, and they rescheduled, but that contact never took place, and that's Monday.

RP (Apr. 3, 2007) at 197.

Second, during the prosecutor's direct examination of Detective Smith about his attempts to contact Hill, the following exchange occurred.

Q: After you notified Mimi, what else was going on? Did you have contact with anybody else that day? This would be Tuesday now.

A: Yeah, I believe I tried to set up an appointment with Mr. Hill.

Q: That would be the defendant?

A: Yes.

Q: Okay, and did you do this in person, by phone, how?

A: I did it on the phone.

...

Q: And when you talked to him, did you set an appointment?

A: We did.

Q: And when was that for?

A: That was for the following morning.

Q: Okay. So that would have been a Wednesday morning at this point?

A: Yes, I believe it would have been a Wednesday.

Q: And during your contact with the defendant, would you tell the jury

what you told him you were investigating?

A: When I'm making phone contact with somebody, I—you really are not sure who you're talking to on the phone, so you try to keep it fairly generic, and you say—I identify myself. I say I'm Detective Smith from the sheriff's office. I have a case I'm investigating. I'd like to talk about it. It's probably no big deal, but do you have time to come down and talk to me? That's pretty much the standard way that I would broach the subject on the phone to get somebody to come and talk to me.

Q: So you didn't specify if it was a burglary down the street, it was a problem with one of his children, a former wife, whether he heard a loud boom two days before?

A: No.

Q: Did he ask you what it was about?

A: He may have. I don't recall.

Q: Okay. So he just agreed to meet with you?

A: Yes.

Q: So did you meet on Wednesday morning?

A: No, we didn't.

Q: What occurred that prevented that meeting?

A: I got a message from Mr. Hill saying he wouldn't be able to make the appointment.

Q: Did he specify a reason why he couldn't make the appointment with you?

A: He said he was too busy at work.

Q: Too busy at work. Did you contact him again?

A: I did.

Q: And did you set up a new appointment when he wouldn't be so busy at work?

A: Yes, we did.

Q: And do you recall when you set that for?

A: I think that was on the afternoon of the appointment, the day that we had the initial appointment for, so Wednesday afternoon.

Q: And that appointment was set for a future date?

A: Yes.

...

Q: Subsequently, did you attempt to physically locate the defendant?

A: I did.

Q: And did you contact his work?

A: I did.

Q: That would be Maple Leaf. Am I saying that right?

A: I think it's Maple Leaf Auto Body.

Q: Auto body, and did they know where he was?

A: No.

Q: Did they indicate whether they'd seen him recently?

A: They indicated he hadn't been at work.

Q: For a period of time?

A: Yes, for several days.

RP (Apr. 10, 2007) at 842–46.

Third, after introducing the evidence in opening statements and the Detective's direct examination, the prosecutor extensively cross-examined Hill about his failure to keep appointments with Detective Smith. Hill said that Detective Smith did not tell him what the allegations were regarding. Hill explained he cancelled the first appointment with Detective Smith and rescheduled it because he was too busy at work. The prosecutor also questioned Hill about the phone calls he made to Mimi and Brenda Rine-Smith right after he got off the phone with Detective Smith.

Fourth, during closing argument, the prosecutor again discussed Hill's failure to keep his appointments with Detective Smith and Hill's subsequent phone calls to Rine-Smith and Mimi.

Phone calls, Detective Smith calls on Tuesday the 7th. I need to talk to you about an allegation or allegations, and you recall what the defendant said, because that's what I'm paraphrasing here, not a major thing, probably take 30 minutes. They set a time for Wednesday, the 8th.

Well, it was a major thing, and Detective Smith didn't want to tell him that. It hadn't been sitting on his desk for months. He simply wanted to reduce the pressure in hopes that he could have an opportunity to talk to him.

So what does the defendant do? He immediately calls Brenda. That's his first call. He cancels the appointment with a message because he's too busy at work. He has a reason for that. Wednesdays are always bad days. Wednesday, every Wednesday that he works there, he can't set appointments because the boss leaves, and he has to run the shop by himself. That was the impression he gave you. I mean, it's like getting up and going to work on Saturday saying—and on Sunday realizing, whoa, I don't work on Saturday. Why did I do that to myself? I mean, we all work on Saturdays, and we all work on Sundays, but we know we're working on Saturdays and Sundays, but something had so flummoxed him that he sets an appointment on the one day that he can't possibly meet it, or he's just telling the officer because he does not

want to talk to him because he knows what this is about. I'm too busy at work. Can we reschedule again? Can we reschedule again?

RP (Apr. 12, 2007) at 1262–63. The prosecutor continued to discuss Hill's subsequent phone calls to Mimi. He then argued,

The question before you, was the defendant afraid that his secret was out? If somebody called you and said, a sheriff's deputy, and said I'd like to meet with you. There's some allegations I need to investigate. Most of us would be shocked by then, but then we'd reflect on it, and say I'm a witness or something. What's this about? Would we set appointments and then break the appointment? Would we make it difficult for the person investigating the case?

But if we knew [what] it was about, would we respond differently? That's a question before you, and then you have to decide is it reasonable, is it reasonable for the defendant to have given up two years of his life in this commitment that he's described to you by just making a couple of phone calls without messages or a couple of phone calls with messages? You ask yourselves what would you have done if you were losing your marriage, and you truly wanted to keep it, and it was truly important to you, and you had done nothing wrong? You would have gone for it. You would have done everything you could to tell your story as to how it wasn't true.

Now, that's just if your marriage is at stake, but we have something that's equally as important, your reputation. Somebody is saying you've sexually abused a child, and it is the child of a woman that you love in a marriage that you want to maintain that is your future. [Are] there any circumstances that you could conceive of that you would have made one phone call, or eight phone calls and just walk away, just walk away? Is that reasonable? Are those the actions of an innocent man, or are those the actions of a man who is not innocent, that's moved on to protect himself, has a whole different list of priorities? We've kind of covered that. So actions do speak louder than words. We say that a lot, but sometimes it has real meaning, and it does in this case.

The other expression is you've got to walk the talk. It's reasonable for you to conclude, and I think the evidence supports only one conclusion, the defendant didn't believe in his innocence. He knew the truth. As soon as the sheriff[s] office called, he had only topic on his mind, is I've been exposed. Has [L.O.] disclosed? And everything he did after that was to protect himself, his calls to Brenda, his efforts to get to Mimi, his testimony before you, and this isn't just something that he thought about on a whim.

RP (Apr. 12, 2007) at 1265–67.

Finally, during rebuttal closing argument, the prosecutor stated,

You have to decide who the defendant is and who he isn't. Is he an honest person? And if you have questions about that, you ask yourself why do I have questions about that. If he's done nothing wrong, you ask yourself why did he cancel the appointment? Why didn't he meet at some time with the sheriffs office? I mean, wouldn't you want to get there right away to clear this up? That's a fair question. You don't have an answer to that.

The defense says you don't give us evidence. They should have talked to the defendant. They should have talked to everybody. Well, they tried, but they don't make all the choices, but don't forget that has evidentiary value to you.

If they had investigated this case thoroughly, they never would have brought the charges. Well, the case was investigated thoroughly. People were talked to. Some of the people where called by the defense, some by the state, teachers. The investigators were called; made an attempt to talk to the defendant, he cancelled

RP (Apr. 12, 2007) at 1299.

The jury convicted Hill as charged. Hill appealed.

ANALYSIS

Hill argues that the prosecutor's questioning and argument about his failure to keep appointments with Detective Smith constituted an impermissible comment on his Fifth Amendment right to remain silent. We agree.

"Both the United States and Washington Constitutions guarantee a criminal defendant the right to be free from self-incrimination, including the right to silence." State v. Knapp, 148 Wn. App. 414, 420, 199 P.3d 505 (2009); U.S. Const. amend. V; Wash. Const. art. 1, § 9. "The right against self-incrimination is liberally construed." State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). "The Fifth Amendment right to silence extends to situations prior to the arrest of the accused." Easter, 130 Wn.2d at 243.

"[A] defendant's pre-arrest silence, in answer to the inquiries of a police officer,

may not be used by the State in its case in chief as substantive evidence of defendant's guilt." State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). "An accused's Fifth Amendment right to silence can be circumvented by the State 'just as effectively by questioning the arresting officer or commenting in closing argument as by questioning defendant himself.'" Easter, 130 Wn.2d at 236 (quoting State v. Fricks, 91 Wn.2d 391, 396, 588 P.2d 1328 (1979)).

"[W]hen the defendant's silence is raised, we must consider 'whether the prosecutor manifestly intended the remarks to be a comment on that right.'" State v. Burke, 163 Wn.2d 204, 216, 181 P.3d 1(2008) (quoting State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)). "A comment on an accused's silence occurs when the State uses the evidence to suggest guilt." State v. Keene, 86 Wn. App. 589, 594, 938 P.2d 839 (1997). But "a prosecutor's statement will not be considered a comment on a constitutional right to remain silent if 'standing alone, [it] was so subtle and so brief that [it] did not "naturally and necessarily" emphasize defendant's testimonial silence.'" Burke, 163 Wn.2d at 216 (quoting Crane, 21 Wn. App. at 152. "A remark that does not amount to a comment is considered a 'mere reference' to silence and is not reversible error absent a showing of prejudice." Burke, 163 Wn.2d at 216.

In addition, "[t]he Fifth Amendment prohibits impeachment based on a defendant's exercise of silence where the defendant does not waive the right and does not testify at trial." Knapp, 148 Wn. App. at 420. But "no constitutional protection is violated if a defendant testifies at trial and is impeached for remaining silent before arrest and before the State's issuance of Miranda^[2] warnings." Burke, 163 Wn.2d at 217. "[E]ven when the defendant testifies

at trial, use of prearrest silence is limited to impeachment and may not be used as substantive evidence of guilt.” Burke, 163 Wn.2d at 217. “Impeachment is evidence, usually prior inconsistent statements, offered solely to show the witness is not truthful. Such evidence may not be used to argue that the witness is guilty or even that the facts contained in the prior statement are substantively true.” Burke, 163 Wn.2d at 219.

Hill did not object below. But he contends an alleged error regarding a comment on the right to remain silent is a manifest error affecting a constitutional right that can be raised for the first time on appeal. RAP 2.5(a)(3); State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002); Keene, 86 Wn. App. 589. The State responds that the alleged error was not manifest and not reviewable for the first time on appeal because the testimony and argument did not rise to the level of a comment on Hill’s right to remain silent.

“The defendant must identify a constitutional error and show how the alleged error actually affected the defendant’s rights at trial. It is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.” State v. Kirkman, 159 Wn.2d 918, 926–27, 155 P.3d 125 (2007). ““Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.”” Kirkman, 159 Wn.2d at 935 (quoting State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)). As explained more fully below, Hill has made a plausible showing that the testimony and

² Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

the prosecutor's comments and argument amounted to a comment on his right to remain silent that had practical and identifiable consequences in the trial. We therefore conclude that Hill may raise this issue for the first time on appeal.

Here, the State introduced evidence and argument about Hill's silence during opening argument and again during direct examination of Detective Smith. The State then elicited references to Hill's silence during cross-examination of Hill and emphasized it during closing argument. The State explains that these were mere references to silence, not comments. According to the State, the prosecutor merely used the timing of the detective's phone call to Hill to argue that Hill's actions after the phone call were consistent with someone who had something to hide. It further contends that the prosecutor properly used the contact with the detective to set up impeachment and challenge Hill's credibility.

It is true that the State used the timing of the detective's phone call to argue that Hill's response to Mimi was not reasonable for a person who loved his wife and believed in his innocence.³ But the record shows that the State's evidence on this point went well beyond this limited purpose. The prosecutor commented during opening remarks and elicited testimony from Detective Smith that Hill failed to keep appointments with the detective. The State then relied on this evidence and on testimony elicited during cross-examination of Hill, to argue to the jury that he failed to keep his appointments with the detective because he knew that he had done something wrong. The State could have advanced its theory about Hill's failure to contact Mimi

³ Because Mimi is not an agent of the State, such argument may be permissible.

without the evidence on his failure to keep appointments with the detective. But the prosecutor used the evidence of Hill's silence to argue that he was guilty. This is impermissible, even for impeachment purposes when a defendant testifies at trial.

Washington case law supports our conclusion that the State impermissibly commented on Hill's right to silence. For example, in Burke, the defendant was charged with rape of a child in the third degree. Burke, 163 Wn.2d at 206. During a prearrest interview, the defendant stated that he had consensual sexual intercourse with a high school girl, but he did not know her age. Burke, 163 Wn.2d at 206. At that point, the defendant's father advised his son not to talk to the police until counsel had been consulted. Burke, 163 Wn.2d at 208. At trial, the defendant argued that he reasonably believed the alleged victim to be 16 years old. Burke, 163 Wn.2d at 208. During its opening statement, case in chief, cross of the defendant, and closing argument, the State emphasized that the defendant's father terminated the interview and that the defendant failed to report the victim's age to the police. Burke, 163 Wn.2d at 209. The court held that the State impermissibly commented on the defendant's right to silence by inviting the jury to infer guilt from his termination of the interview. Burke, 163 Wn.2d 222. Reversal was required. Burke, 163 Wn.2d at 222–23.

In Easter, the prosecutor elicited testimony from a police officer that the defendant refused to answer questions and looked away without speaking. Easter, 130 Wn.2d at 241. The prosecutor, referring to this testimony, repeatedly characterized the defendant as a "smart drunk" during closing arguments. Easter, 130 Wn.2d at 242. The court concluded that the prosecutor impermissibly commented on the defendant's right to silence by eliciting the police

officer's testimony and inviting the jury to infer guilt from the defendant's silence.

Easter, 130 Wn.2d at 242–43. The error was prejudicial, necessitating a new trial.

Easter, 130 Wn.2d at 243.

In State v. Thomas, 142 Wn. App. 589, 594, 174 P.3d 1264 (2008), the defendant argued that the prosecutor violated his right to remain silent by eliciting testimony from a police officer that the defendant refused to talk to her and then emphasizing during closing argument that the defendant refused to talk to the police even though he had been accused of a crime. The State argued that the police officer's testimony was a mere reference to silence and that the prosecutor's remarks in closing were properly used to impeach the defendant's credibility after he testified at trial. Thomas, 142 Wn. App. at 594–95. The court held that the police officer's testimony was no more than a passing reference to the defendant's silence, but that the prosecutor improperly used it to argue that if the defendant were not guilty, he would have talked to the police. Thomas, 142 Wn. App. at 596. The court also held that the prosecutor's argument went beyond impeaching the defendant's story because it plainly invited the jury to infer guilt from the defendant's refusal to talk to police. Thomas, 142 Wn. App. at 597. The error was not harmless. Thomas, 142 Wn. App. at 597–98.

And in Keene, a police detective testified that she called the defendant several times to discuss child abuse allegations. Keene, 86 Wn. App. at 591. They scheduled an appointment, but the defendant called later to say that he missed it. Keene, 86 Wn. App. at 592. The detective testified that she exchanged phone messages with the defendant, informing him “that if I hadn't

heard from him by the 22nd I would need to turn it over to the prosecuting attorney's office.” Keene, 86 Wn. App. at 592. The detective then testified that she did not hear from the defendant again. Keene, 86 Wn. App. at 592. In closing the prosecutor argued, “It’s your decision if those are the actions of a person who did not commit these acts.” Keene, 86 Wn. App. at 592. The court held that the detective’s testimony and the prosecutor’s closing arguments constituted an impermissible comment on the defendant’s right to remain silent because the State used this evidence to suggest guilt. Keene, 86 Wn. App. at 594. Because the error was not harmless, reversal was required. Keene, 86 Wn. App. at 595.

The State’s reliance on Lewis, 130 Wn.2d 700 and State v. Saavedra, 128 Wn. App. 708, 713, 116 P.3d 1076 (2005) is misplaced. In Lewis, a detective testified that he told the defendant, “[I]f he was innocent he should just come in and talk to me about it.” Lewis, 130 Wn.2d at 703. The court concluded that the officer’s testimony was not used as evidence of the defendant’s guilt—the detective did not say that the defendant refused to talk to him, did not reveal the fact that defendant failed to keep appointments, and did not tell the jury that the defendant’s silence was proof of guilt. Furthermore, the prosecutor did not argue that the defendant refused to talk with the police or suggest that silence implies guilt. Lewis, 130 Wn.2d at 706. Given this “brief and ambiguous” testimony, the trial court did not abuse its discretion in denying the defendant’s motion for a mistrial. Lewis, 130 Wn.2d at 707. Here, in contrast, the State elicited testimony that Hill failed to keep appointments and used this evidence to argue Hill’s guilt.

In Saavedra, 128 Wn. App. at

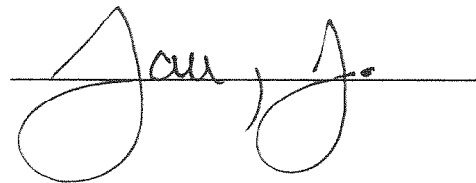
711–12, a detective testified regarding his unsuccessful attempts to locate and contact the defendant. The court held that this testimony did not implicate the defendant’s right to silence—the detective did not testify that defendant hid in response to his inquiries, failed to answer questions, or refused to contact him. Furthermore, the State did not ask the jury to consider this testimony as evidence of guilt. The court distinguished cases in which the offending testimony concerned a defendant’s silence after actual contact with law enforcement.⁴ Saavedra, 128 Wn. App. at 715. Here, in contrast, the prosecutor elicited testimony about Hill’s behavior after contact with law enforcement, and used it to argue guilt.

Because we conclude that the testimony and argument constituted an impermissible comment on Hill’s right to remain silent, the State bears the burden of showing that the error was harmless. Keene, 86 Wn. App. at 594. “We find constitutional error harmless only if convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error, and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt.” Easter, 130 Wn.2d at 242. “Where the error is not harmless, a defendant is entitled to a new trial.” Keene, 86 Wn. App. at 594.

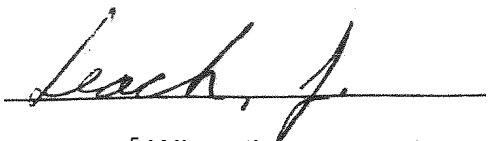
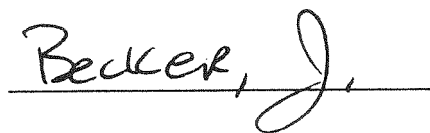
The State argues that any error was harmless because its impact was minimal, particularly where Hill’s failure to make the appointments was already in evidence through Scott’s inadvertent testimony.⁵ The untainted evidence consisted of L.O.’s

⁴ Keene, 86 Wn. App. at 592; Easter, 130 Wn.2d at 232; Romero, 113 Wn. App. at 785.

testimony that the abuse occurred, supported by her disclosures to a friend, a teacher, her mother, the CPS interviewer, and the sexual abuse medical examiner. There was also evidence that Hill was untruthful in other areas of his life and that his failure to contact Mimi after the allegations emerged was inconsistent with a man who loved his family. But there were no witnesses to the abuse and no physical evidence. Hill's theory was that L.O. fabricated the allegations because she did not want her mother to stay with him. He presented evidence that L.O. had behavioral and discipline problems and argued that her story about the abuse was vague and inconsistent. We conclude that the untainted evidence, although strong, is not so overwhelming that it necessarily leads to a finding of guilt.⁶ We therefore reverse and remand for a new trial.⁷

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WE CONCUR:

A handwritten signature in cursive script, appearing to read "Leach, J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Becker, J.", written over a horizontal line.

⁵ When the prosecutor asked Scott whether she notified Hill about the obligations or whether someone else took care of that, Scott replied, "Detective Smith made an appointment for Mr. Hill to come and meet and Mr. Hill cancelled that." RP (Apr. 4, 2007) at 393. Defense counsel objected based on hearsay, and the trial court sustained the objection.

⁶ We observe that the record shows that the jury indicated it was evenly split on whether to convict Hill. With a few minor exceptions, the witnesses in the first trial were the same as the second trial.

⁷ We therefore do not address Hill's remaining assignments of error.

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